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No. 89-1705

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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ATLAS CORPORATION, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly concluded that government contractors had failed to state a claim that mutual mistake of fact required contract reformation.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 895 F.2d 745. The opinion of the United States Claims Court (Pet. App. 27a-46a) is reported at 15 Cl. Ct. 681.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 47a) was entered on February 2, 1990. The petition for a writ of certiorari was filed on May 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In the period following the Second World War, the Federal Government, acting through the Atomic Energy Commission (AEC), initiated a major program designed to encourage the domestic production of uranium and other sources of atomic energy. Pet. App. 2a. The AEC prompted development of the industry by contracting with private companies to purchase uranium production, funding research and development activities, and providing technical support. *Ibid.*

Petitioners, or their predecessors, held contracts with the AEC from 1950 to 1970 to supply uranium and/or thorium concentrate to the federal government at a fixed-price per pound. Pet. App. 2a-3a, 31a. Each contract was individually negotiated and the contract price was determined based upon ore cost, estimated milling costs, plant amortization over the contract period, and a reasonable profit. Pet. App. 31a. After 1970, petitioners were engaged in the production of uranium and thorium for commercial use. Pet. App. 32a.

The production process results in significant quantities of a sand-like waste residue, known as mill tailings, which has been deposited into large piles on land adjacent to the mills. Pet. App. 3a, 29a. The large piles now also include mill tailings generated from the commercial production which began in 1970. Pet. App. 32a. The tailings emit a low level of radiation, primarily in the form of radon gas. Pet. App. 29a. Knowledge that the low level of radiation emitted by the tailings poses a long-term potential health hazard was nonexistent when the contracts were negotiated and performed; it became widespread in the late 1970's. Pet. App. 32a.

To alleviate this hazard, Congress in 1978 enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA), Pub. L. No. 95-604, 92 Stat. 3021 (codified at 42 U.S.C. 2022, 2113, 2114, 7901-7942). Title I of the UMTRCA provides that the Federal Government has responsibility for the stabilization and decommissioning of all inactive mill sites which were not licensed on January 1, 1978. 42 U.S.C. 7911-7919. Title II of the UMTRCA provides that the licensees of sites as of January 1, 1978, are responsible for complying with federal requirements regarding stabilization, decontamination, and decommissioning of the plant sites. 42 U.S.C. 2113. The Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission subsequently issued regulations governing such activities. 10 C.F.R. 40, 150; 40 C.F.R. 192. As a result of the UMTRCA and the regulations issued pursuant to it, petitioners have been required to undertake costly measures to stabilize, decommission, and reclaim the tailings piles and the plant sites. Pet. App. 33a.

Petitioners' contracts with the government, from 1950 to 1970, were long ago completely fulfilled by the parties—the concentrate was delivered and the negotiated price paid in full. Pet. App. 15a, 37a. It is undisputed that none of the contracts at issue contains any express provision concerning responsibility for the cost of decommissioning and decontaminating the mills, clean-up and reclamation of the mill sites, or stabilization and reclamation of the tailings piles. Pet. 3; Pet. App. 32a.

2. Petitioners brought suit in the Claims Court seeking recovery of their stabilization and reclamation costs based upon various theories, including contract reformation, breach of express contract, and

breach of implied-in-fact contract.[1] Petitioners alleged that the parties to the contracts did not and could not have recognized the hazard posed by the mill tailings and that, had the hazard been known, the costs of obviating the hazard would have been included in the contract. Pet. App. 11a-12a.

The United States moved to dismiss the complaints for failure to state a claim upon which relief could be granted. With respect to petitioners' reformation claims, the United States explained that a court can reform a contract only to correct a mistake made by the parties in reducing their agreement to writing. Reformation thus could be granted only because of a mistake concerning the facts as they existed at the time the parties entered into the contract; a failure accurately to foresee the future was not a mistake upon which reformation could be granted. Because the UMTRCA and the extensive measures required to stabilize and reclaim the mills flowed from the unanticipated actions of Congress, the plaintiffs were not alleging a mistake as to existing facts but were seeking to have the court write a new agreement for the parties. Having failed to allege facts that would support a mutual mistake, the complaints thus failed to state a claim upon which the relief of reformation could be granted. Gov't Mot. for Judg. on Pleadings 16-21.

The Claims Court granted the government's motion to dismiss,[2] noting that its jurisdiciton was lim-

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[1] Petitioners have abandoned all theories here except for their claims for contract reformation based upon the doctrine of mutual mistake. Pet. i; Pet. 3 n.1.

[2] The court dismissed all counts of all complaints with the exception of two claims raised by Western Nuclear, Inc. Although Western Nuclear joined in the appeal filed with the

ited to enforcing an agreement that was actually negotiated by the parties and that it did not have jurisdiction to write a new agreement for the parties. Specifically, the court explained that

> for reformation to form the predicate for a money judgment under 28 U.S.C. § 1491, there must be a prior agreement by the government as to the provisions involved which can be given effect. The Claims Court has no authority to write contracts, or contract clauses, for the United States by means of reformation.

Pet. App. 34a. The court found that the circumstances pled precluded any actual agreement with respect to the costs of obviating the tailings hazard because "it was not possible for the hazard to have been known to the parties when contracting, [and therefore] no agreement could have been made * * * which can now be placed into effect." Pet. App. 34a-35a.[3]

3. The court of appeals affirmed. Pet. App. 1a-26a. It agreed that reformation was available only "to make [a contract] reflect the true agreement of the parties on which there was a meeting of the minds." Pet. App. 8a. In such cases, the court explained, "the parties recognize the existence of a fact about which they could negotiate, they mutually form

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Court of Appeals for the Federal Circuit, it has not joined in the petition.

[3] The Claims Court also explained that an indefinite agreement to pay some future cost "would not have been sanctioned by the published AEC policy which was premised upon determining a fixed price for [uranium] delivered during the contract period" and that it might have been beyond the scope of authority of a government officer to make such an agreement. Pet. App. 36a n.2.

a belief concerning that fact, but their belief is erroneous." Pet. App. 9a. Noting that in their complaints each of the petitioners stated that the hazard associated with the mill tailings was not within the contemplation of the parties when they entered into the contracts, the court concluded that the parties could not have formed any agreement regarding tailings costs and, consequently, could not have formed a mutually mistaken belief concerning those costs. Pet. App. 11a. In sum, the court found that petitioners "have failed to allege a mistake that can support reformation." Pet. App. 7a, 13a.

The court of appeals held that petitioners had also failed to state a claim for breach of an express contract or to demonstrate the existence of an implied-in-fact contract. Noting that their arguments must therefore reduce to claims that the government owed them an obligation "imposed by law," the court confirmed that the Claims Court was without jurisdiction to hear "implied in law" contract claims. Pet. App. 18a-19a. The court therefore affirmed the Claims Court's dismissal of the contract claims because petitioners had failed "to state redressable claims." Pet. App. 20a.

## ARGUMENT

The court of appeals' decision is correct and consistent with well established rules of contract reformation. It does not conflict with any decision of this Court or any court of appeals. Nor does it introduce any new jurisdictional standard under the Tucker Act. Further review is therefore not warranted.

1. Petitioners' contention that the Claims Court improperly declined to reform their contracts with the United States is without merit. It hangs on the assertion (Pet. 5-7) that the Claims Court introduced into the law of mutual mistake a novel and dangerous concept when it discussed "knowable" and "unknowable" facts in resolving petitioner's reformation claim.

In fact, as the court of appeals made clear (Pet. App. 13a), the Claims Court was merely attempting by its distinction between "knowable" and "unknowable" facts to express the conventional doctrine that reformation is only available to enforce an agreement about existing facts reached by the parties. The court of appeals thus itself applied, and found petitioners' claims deficient according to, traditional principles of the doctrine of mutual mistake. Pet. App. 7a-10a.

Specifically, the court explained that a party seeking to state a claim for reformation based upon the doctrine of mutual mistake must allege:

(1) that the parties were mistaken in their belief regarding a fact;

(2) that the parties' mistaken belief constituted a basic assumption upon which the contract was based;

(3) that the mistake had a material effect on the parties' bargain; and

(4) that the contract did not put the risk of the mistake on the party seeking reformation.

Pet. App. 7a. See Restatement (Second) of Contracts § 151, at 383 (1981) (mistake "must relate to the facts as they exist at the time of the making of the contract") [hereinafter Restatement (2d)]; *id.* § 152, at 385 (mistake must concern "basic assumption" that has "material effect" on party who does not bear the risk of the mistake); *id.* § 155. The court explained that in order to satisfy the first element, "a plaintiff must allege that he held an erroneous belief as to an existing fact." Pet. App. 7a. See Restatement (2d) Ch. 6, at 379 (mistake must relate "to existing facts"). The court then reasoned that "[i]f the *existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact." Pet. App. 7a (emphasis in original). Similarly, if the parties have no belief concerning a fact, there can be no agreement between them concerning that fact. Pet. App. 8a. The court of appeals correctly concluded that "[r]eformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed." *Ibid.* (quoting 3 A. Corbin, *Corbin on Contracts* § 614, at 723 (1960)).

This analysis is consistent with long-standing tenets of contract law. A court may reform a contract only "to make a writing express the bargain which the parties desired to put into writing." 13 S. Williston, *Williston on Contracts* § 1549, at 132 (3d ed. 1970); accord Restatement (2d) § 155, at 406; see, *e.g.*, *McNamara Construction of Manitoba, Ltd.* v. *United States*, 509 F.2d 1166, 1171 (Ct. Cl. 1975):

> For reformation we would need some antecedent expressions by the parties at variance with the terms of the contract or some articulated mutual assumption * * * which we would incorporate into the agreement or some indication that a mutual mistake existed as to a hard fact on which the parties had based the contract.

A court may not reform a contract to make a bargain the parties did not intend to make. See *Russell* v. *Shell Petroleum Corp.*, 66 F.2d 864, 867 (10th Cir. 1933) ("It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."). Similarly, a court may not rewrite a contract for the parties or draw up a new agreement to cover an unforeseen situation. *American President Lines, Ltd.* v. *United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987). "[T]he erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here." Restatement (2d) § 151, at 383.

In this case, petitioners state (Pet. 6) that the parties' agreement was that the United States would pay the full costs of production. However, there is no evidence that, at the time the contracts were made, the parties recognized or agreed that the costs of production included the costs of stabilization and reclamation of the tailings. To the contrary, petitioners allege that the parties did not even contemplate the possibility that costs to stabilize and decommission the tailings piles would be incurred. Pet. App. 11a-12a.

That circumstance does not represent an "articulated mutual assumption" that was in error or a

mutual mistake of "hard fact." It is instead an allegation that the parties did not anticipate future legislative and regulatory action that made stabilization and decommission of the tailings piles necessary. As explained above, however, reformation is not available to conform a contract to what the parties "would have agreed" or "would have intended" had they known better. See 13 S. Williston, *supra*, § 1548, at 122; see also, *e.g.*, *id.* § 1549, at 134-135.[4]

2. Contrary to petitioners' contention (Pet. 6), the judgment in this case does not conflict with *Na-*

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[4] Petitioners assert (Pet. 8) that the court's analysis is inconsistent with the district court's reasoning in *Aluminum Co. of America* v. *Essex Group, Inc.*, 499 F. Supp. 53, 64 (W.D. Pa. 1980). There, the court rejected the distinction between facts which are "unknown but presently knowable," and facts which "presently exist but are unknowable," finding both sufficient to suport a claim of mutual mistake. However, as the court of appeals recognized here (Pet. App. 11a), the court in *Aluminum Co.* was using the terms in a different manner. Thus it explained that while the crucial fact —the predictive value of an indicator—was "not known and was scarcely knowable," it was "a matter of fact, existing at the time they made the contract." 499 F. Supp. at 64. Specifically, the district court determined that the parties' mistake concerning the accuracy of the Wholesale Price Index as an indicator of nonlabor costs "was essentially a present actuarial error."

In contrast, the court of appeals explained that where the very *existence* of a fact is unknowable, as here, "the parties cannot have a belief concerning that fact, and they cannot make a mistake about it." Pet. App. 11a. Here, neither the United States nor petitioners knew of the existence of any hazard associated with the mill tailings. Therefore, they could not make a mistake about the hazard, including a mistake about the cost of the hazard. The problem instead arises because of the parties' failure to predict that Congress would enact a statute requiring petitioners to expend money to stabilize the tailings piles.

*tional Presto Industries, Inc.* v. *United States*, 338 F.2d 99 (Ct. Cl. 1964), cert. denied, 380 U.S. 962 (1965). In *National Presto*, the parties were aware of the possibility of an additional manufacturing step, negotiated over whether to include the requirement in the contract, and agreed that the step was not needed for completion of the contract. During performance, it was determined that the additional step was, in fact, necessary. The court found that the parties had labored under a "misapprehension" about the existing technologies of the process. 338 F.2d at 108; see Pet. App. 9a. ("They recognized the existence of a fact on which they could reach an agreement, and they formed an erroneous belief concerning that fact."). Accord *R.M. Hollingshead Corp.* v. *United States*, 111 F. Supp. 285 (Ct. Cl. 1953) (parties mutually mistaken about possibility of performing contract requiring delivery of DDT in metal containers without a loss of clear color). By contrast, the parties in the case at hand failed to anticipate a future action by the government imposing a duty to clean up a hazard not yet recognized.

3. Petitioners assert (Pet. 8, 10-11) that the court's analysis of the law of mutual mistake precludes any possibility "that parties ignorant of a hazard may still enter into an agreement that encompasses the unforeseen liability." Not so. First, as the court of appeals noted (Pet. App. 19a), there are several methods by which petitioners might have protected their interests, such as including in their contracts an escalation clause, a price adjustment provision, or a contract provision making the contract price redeterminable. *Ibid.*[5]

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[5] Thus the court stated that, however compelling the facts, the conclusion was inescapable that petitioners' damages resulted simply from bad business decisions. The court ex-

Second, insofar as petitioners are actually seeking relief for subsequent liabilities imposed on their industry by the legislature, government contractors have no different or more privileged a claim to relief than do others. As this Court held long ago,

> The two characters which the government possesses as a contractor and as a sovereign cannot be * * * fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.

*Horowitz* v. *United States*, 267 U.S. 458, 461 (1925). The UMTRCA and its implementing regulations are "public and general" acts of government; they do not thereby alter pre-existing contractual obligations between the government and private parties.[6] See, *e.g.*, *Tony Downs Food Co.* v. *United States*, 530 F.2d 367, 370-372 (Ct. Cl. 1976); *D.R. Smalley & Sons* v. *United States*, 372 F.2d 505, 507 (Ct. Cl.), cert. denied, 389 U.S. 835 (1967).

4. Petitioners challenge (Pet. 6) the dismissal of their complaints as manifesting "an unprecedented and fundamental shift in the contractual jurisdiction

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plained that it was not within the jurisdiction of the Claims Court to permit petitioners "to renegotiate their contracts in order to take into account matters not considered when the contracts were negotiated." Pet. App. 19a.

[6] For example, there is no contention that the obligations imposed by UMTRCA and the regulations affect those who completed contracts with the government in 1970, and no longer held licenses for sites in 1978.

of the Claims Court." In making this argument, petitioners have confused the court of appeals' analysis of the law of mutual mistake with the court's analysis of the Claims Court's jurisdiction.

The court of appeals did not, as petitioners assert, create a new jurisdictional bar to contract claims. Instead, the court concluded that petitioners had failed to allege facts that would demonstrate the existence of an agreement which the court could enforce. Pet. App. 7a, 18a-20a. The court first considered, and affirmed, the Claims Court's holding that petitioners' complaints failed to state a claim that the contracts which they had concluded with the government should be reformed. Pet. App. 7a, 13a. The court of appeals then considered, and affirmed, the Claims Court's holdings that the complaints failed to allege the breach of any express contractual provision or facts demonstrating a meeting of minds that would create an implied-in-fact contract (Pet. App. 13a-18a), as required in order to establish the existence of jurisdiction in the Claims Court under the Tucker Act. See *W.R. Cooper General Contractor, Inc.* v. *United States*, 843 F.2d 1362 (Fed. Cir. 1988). Given petitioners' failure to allege facts that would establish a claim to contract reformation or the breach of an express or implied-in-fact contract, the court of appeals noted that petitioners' claims must reduce to an implied-in-law contract claim ("an obligation that is imposed by law" on the government) or a general equitable plea for "justness." Pet. App. 18a-19a. The court then confirmed the Claims Court's unexceptional holding that it had no jurisdiction over such claims. Pet. App. 19a; see *Merritt* v. *United States*, 267 U.S. 338, 341 (1925). The court of appeals thus concluded that the complaints had "fail[ed] to state redressable

claims." Pet. App. 20a. It therefore properly affirmed the Claims Court's dismissal of the claims.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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